Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
MARITIME COMMUNICATIONS/LAND MOBILE, LLC	)	**EB Docket No. 11-71** **File No. EB-09-IH-1751** **FRN: 0013587779**
	)	
Participant in Auction No. 61 and Licensee of Various Authorizations in the Wireless Radio Services	)	
	)	
Applicant for Modification of Various Authorizations in the Wireless Radio Services	)	
	)	
Applicant with ENCANA OIL AND GAS (USA), INC.; DUQUESNE LIGHT COMPANY; DCP MIDSTREAM, LP; JACKSON COUNTY RURAL MEMBERSHIP ELECTRIC COOPERATIVE; PUGET SOUND ENERGY, INC.; ENBRIDGE ENERGY COMPANY, INC.; INTERSTATE POWER AND LIGHT COMPANY; WISCONSIN POWER AND LIGHT COMPANY; DIXIE ELECTRIC MEMBERSHIP CORPORATION, INC.; ATLAS PIPELINE – MID CONTINENT, LLC; DENTON COUNTY ELECTRIC COOPERATIVE, INC., DBA COSERV ELECTRIC; AND SOUTHERN CALIFORNIA REGIONAL RAIL AUTHORITY	)	**Application File Nos. 0004030479, 0004144435, 0004193028, 0004193328, 0004354053, 0004309872, 0004310060, 0004314903, 0004315013, 0004430505, 0004417199, 0004419431, 0004422320, 0004422329, 0004507921, 0004153701, 0004526264, 0004636537, and 0004604962**
	)	
For Commission Consent to the Assignment of Various Authorizations in the Wireless Radio Services	)	

To: The Commission

CONSOLIDATED REPLY TO OPPOSITIONS TO PETITION FOR RECONSIDERATION

Atlas Pipeline Mid-Continent LLC, Denton County Electric Cooperative, Inc. d/b/a CoServ Electric, Dixie Electric Membership Corporation, Inc., DCP Midstream, LP, Enbridge Energy Company, Inc., EnCana Oil & Gas (USA) Inc., Interstate Power and Light Company, Jackson County Rural Electric Membership Corporation, and Wisconsin Power and Light Company

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By their attorneys and pursuant to Section 1.106(h) of the rules and regulations of the Federal Communications Commission ("Commission"),[1] Atlas Pipeline Mid-Continent, LLC ("Atlas"); DCP Midstream, LP ("DCP"); Denton County Electric Cooperative, Inc. d/b/a CoServ Electric ("CoServ"); Dixie Electric Membership Corporation, Inc. ("DEMCO"); Enbridge Energy Company, Inc. ("Enbridge"); EnCana Oil & Gas (USA) Inc. ("Encana"); Interstate Power and Light Company ("IPL"); Jackson County Rural Electric Membership Corporation ("Jackson County REMC"); and Wisconsin Power and Light Company ("WPL") (collectively, the "*CII Petitioners*"),[2] hereby submit this Consolidated Reply to the Oppositions filed separately by the Enforcement Bureau ("Bureau") and SkyTel Spectrum Foundation ("SkyTel") to their Petition for Reconsideration ("Petition") of the Hearing Designation Order ("HDO") in this proceeding.[3]

The *CII Petitioners* are electric utilities or oil and gas companies, which, along with railroads, are defined as Critical Infrastructure Industry ("CII") entities under the Commission's rules.[4] The *CII Petitioners* urge the Commission to remove their longstanding applications from the ambit of this hearing proceeding, as they have allowed Southern California Regional Rail Authority ("Metrolink"), a railroad, to do. Neither the Commission in its HDO nor the Bureau in its Opposition provide any reasoned analysis or explanation why a railroad would be permitted to remove itself from this hearing proceeding while multiple electric utilities and oil and gas companies, which also provide critical infrastructure services, are denied the same right.

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[1] 47 C.F.R. § 1.106(h) (2010).

[2] In its Opposition, the Bureau declines to refer to the *CII Petitioners* by name, instead using a less descriptive and more generic term (and one more consistent with the Bureau's theories): "Petitioners."

[3] *Maritime Communications/Land Mobile, LLC* ("Maritime"), Order to Show Cause, Hearing Designation Order, and Notice of Opportunity for Hearing, FCC 11-64 (*rel.* Apr. 19, 2011).

[4] 47 C.F.R. § 90.7 (2010).

The Bureau's Opposition not only manifests a surprising indifference to the spectrum requirements of electric utilities and oil and gas companies, it misapplies the Commission's *Jefferson Radio* precedent and ventures far beyond the Bureau's delegated authority and recognized expertise. For its part, in its Opposition, SkyTel claims the mandatory inclusion of the *CII Petitioners*' applications in the HDO, under threat of dismissal with prejudice, is somehow not "adverse" to the *CII Petitioners*. Neither Opposition has merit.

The *CII Petitioners* should be removed from this hearing proceeding, and their respective applications (some of which have been held in abeyance for years) should be granted while the Bureau conducts its investigation of Maritime.

I. THE HDO UNFAIRLY DISCRIMINATES AGAINST ELECTRIC UTILITIES AND OIL AND GAS COMPANIES IN FAVOR OF A RAILROAD.

In the HDO, the Commission does not explain why it singled-out and afforded Metrolink an opportunity to remove itself from the hearing while declining a similar opportunity to *CII Petitioners*. The HDO states:

> Metrolink has represented that it plans to use such assigned spectrum to comply with the Rail Safety Improvement Act of 2008. This law requires, among other things, that by 2015, passenger trains implement positive train control systems and other safety controls to enable automatic braking and to help prevent train collisions. *Given the potential safety of life considerations involved* in the positive train control area and therefore attendant to the Metrolink application, we will, upon an appropriate showing by the Parties, consider whether, and if so, under what terms and conditions, the public interest would be served by allowing the Metrolink application to be removed from the ambit of this Hearing Designation Order.[5]

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[5] HDO at *fn* 7 (emphasis added).

There is no similar discussion regarding the spectrum requirements of the *CII Petitioners*. Their need for critical infrastructure spectrum is not even mentioned in the HDO.

As described in the Petition, there is no basis in the record or otherwise for treating Metrolink (a railroad recognized as a CII entity under the Commission's rules and decisions) differently from the *CII Petitioners* (electric utilities and oil and gas companies also recognized as CII entities under the Commission's rules and decisions). Nor is there any basis in public policy that would warrant unequal treatment.

Neither the Commission nor the Bureau provide any explanation for the disparate treatment of the *CII Petitioners* in the HDO, and none exists. Like the *CII Petitioners*, the Bureau can only guess why the Commission afforded Metrolink – but not the similarly-situated *CII Petitioners* – the opportunity for removal from the hearing. The Bureau claims that the Commission was "obviously aware" of the merits of the various pending applications and drew a "carefully and narrowly drawn exception" on behalf of Metrolink,[6] but there is nothing in the HDO or the record to support these claims.

According to the Bureau, "in adopting the specific language of footnote 7, the Commission *apparently* concluded that Metrolink's applications are unique among those designated for hearing in the HDO,"[7] and that the Commission "*likely* appreciated that use of the wireless spectrum at issue … would be critical for [Metrolink] to implement PTC."[8] Again, none of this is evident from the HDO, which stated simply that "g*iven the potential safety of life*

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[6] Bureau Opposition, p. 6.

[7] Enforcement Bureau's Opposition to *CII Petitioners* Motion to Hold Hearing in Abeyance at p. 3 (May 31, 2011) (emphasis added).

[8] Bureau Opposition at p. 8 (emphasis added).

considerations" only the railroad applicant among all the CII entities in this proceeding should have the right to extract itself from the hearing.

No evaluation of the relative merits of the other applicants was performed by the Commission in the HDO, and, as described below, the Bureau possesses no particular expertise in that regard. Instead, in an attempt to support the Commission's decision, the Bureau refers to the undeniable danger of running a railroad and ignores the equal or greater risks associated with distributing thousands of volts of electricity or transmitting massive quantities of natural gas.

The *CII Petitioners* rely on spectrum for "safety of life considerations," just like PTC, and their operations, too, are responsive to federal mandates.[9] They are entitled to the same opportunity the Commission afforded Metrolink – to make a showing that their applications also should be removed from the hearing.

II. THE ENFORCEMENT BUREAU HAS EXCEEDED ITS DELEGATED AUTHORITY IN OPPOSING THE *CII PETITIONERS'* REQUEST.

Under the Commission's rules, the Bureau is the "primary Commission entity responsible for enforcement of the Communications Act and other communications statutes, the Commission's rules, Commission orders and Commission authorizations."[10] The authority delegated to the Bureau is specifically limited to enforcement functions.[11] All novel questions or

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[9] For example, in 2009 the Pipeline and Hazardous Materials Safety Administration ("PHMSA") issued a final rule amending the pipeline safety regulations governing control room management for pipelines where controllers use SCADA systems. 74 Fed. Reg. 63311 (Dec. 3, 2009). Last year, the Environmental Protection Agency ("EPA") implemented new environmental monitoring standards that require the use of wireless spectrum. 40 C.F.R. §§ 63.1 *et seq.* (2010). *See also Mandatory Greenhouse Gas Reporting Rule and National Emission Standards for Hazardous Air Pollutants for Reciprocating Internal Combustion Engines*, Final Rule, 75 Fed. Reg. 51570 (Aug. 20, 2010).

[10] 47 C.F.R. §0.111(a) (2010).

[11] *Id.*

law, fact or policy that cannot be resolved under existing precedents and guidelines are to be referred to the full Commission for disposition.[12] The Bureau possesses no authority or expertise in judging the relative public safety merits of different CII applicants or determining which CII entities have a pressing need for wireless spectrum and which do not.

Although the Bureau has been designated as a party in the HDO proceeding, it has no advisory role in regard to the Commission's reconsideration of the HDO itself. Under the rules, the Bureau is an enforcement arm charged with implementing the HDO, not opining on the relative merits of applicants that should be subject to it. To the extent any bureau in the Commission possesses expertise and authority and might render an opinion regarding the relative merits of different CII applicants, it would be the Wireless Telecommunications Bureau (WTB),[13] not the Bureau. But, to our knowledge, the WTB has remained silent.

The Bureau overstepped its authority under the Commission's rules by opposing the Petition and opining on the public safety implications and relative merits of various CII applicants. Even so, the Bureau failed to provide any justification (since there is none) for the Commission's blatantly disparate treatment of similarly situated, critical infrastructure entities.

III. THE ENFORCEMENT BUREAU MISAPPLIES *JEFFERSON RADIO*

The Bureau argues that the *CII Petitioners* seek to "gut the Commission's longstanding character qualifications and *Jefferson Radio* policies and would have broad application far beyond the wireless radio service."[14] Not so.

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[12] 47 C.F.R. § 0.311(a)(3) (2010).

[13] 47 C.F.R. § 0.131 (2010).

[14] Enforcement Bureau Opposition at p. 6.

While establishing a general principle that the Commission will not assign a *broadcast* license until issues relating to the underlying authorization are resolved, *Jefferson Radio* was in response to an attempted assignment to an entity jointly controlled by the alleged "bad actor."[15] That is not the case here, where no questions have been raised in the HDO regarding the *CII Petitioners*' qualifications as licensees. In a multitude of decisions, the Commission has made clear that it has ample authority to allow the assignment of a license in the public interest during the pendency of an enforcement action against an existing licensee.[16]

The Commission has recognized that allowing assignments in the context of *non-*broadcast licenses (such as those involved here) is even more important,[17] where "deferral of all actions on all of the licenses held by a multiple licensee pending a final resolution of character issues raised by alleged misconduct may operate to the detriment of the public interest."[18] In

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[15] *See Jefferson Radio, Inc. v. FCC*, 340 F.2d 781, 783 (D.C. Cir. 1964) ("*Jefferson*"); cf. *Stereo Broadcasters, Inc. v. FCC,* 652 F.2d 1026, 1027 (D.C. Cir. 1981)("*Stereo Broadcasters, Inc.*"), *citing, Northland Television, Inc.,* 68 F.C.C.R 1566, 43 Rad. Reg. 2d (P & F) 1567 (1978) for the proposition that permitting a licensee to evade the consequences of alleged or adjudicated misconduct by transferring its interest or assigning its license will diminish the deterrent effect that revocation or renewal proceedings should have on licensees and will allow them to benefit despite their course of conduct. *See also Northwestern Indiana Broadcasting Corp.,* 60 FCC 2d 205, 209-10 (1976).

[16] *Cellular System One of Tulsa*, Memorandum Opinion and Order, 102 FCC 2d 86, at ¶¶ 9-10 (1985) ("*Cellular System One of Tulsa*"); *Little Rock Radio Telephone Company, Inc.*, Memorandum Opinion and Order, 89 F.C.C. 2d 400, at ¶¶21-22 (1982). *See, e.g.,* Second Thursday Corp., *Memorandum Opinion and Order*, 22 FCC 2d 515 (1970), recon. granted, Memorandum Opinion and Order, 25 FCC 2d 112 (1970) (to harmonize policies of federal bankruptcy law with those of the Communications Act, a grant without hearing of applications by applicant with qualifications issues may be made if the individuals charged with misconduct will have no part in the proposed operations and will either derive no benefit from favorable action on the applications or only a minor benefit which is outweighed by equitable considerations in favor of innocent creditors); *Hertz Broadcasting of Birmingham, Inc.*, Memorandum Opinion and Order, 57 FCC 2d 183, 184-85 (1976) (evidentiary hearing terminated on basis of principal's disabling illness; station sale permitted for no profit); and *Lois I. Pingree*, Memorandum Opinion and Order, 69 FCC 2d 2179, 2183-84 (1978) (no-profit sale permitted where disability provides mitigation for wrongdoing).

[17] *Applications of Cablecom-General, Inc.*, 87 FCC 2d 784, 790-791 (1981) (allowing a transfer of control involving applications in several non-broadcast services, including the Cable Television Relay Service (CARS); point-to-point common carrier microwave radio service; and the satellite communications service.)

[18] *Cellular System One of Tulsa*, at ¶8 (1985). "An agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion." *Otis L. Hale d/b/a Mobilfone Communications*, Order to Show Cause and Memorandum Opinion and Order Designating Applications

fact, the Commission relied on this exception in the HDO when it afforded Metrolink the opportunity to extract itself from the ambit of the hearing.

The decision of whether to approve a license assignment under these circumstances "turns upon a balancing of the public interest considerations favoring the free transferability of the licensee's interest against the Commission's long-term interest in deterrence to determine whether, on the whole, the public interest weighs in favor of free transferability."[19] Applying this balancing test to the HDO, the *CII Petitioners'* applications – some of which have been pending for years – should be promptly granted.

The licenses at issue are used for non-broadcast purposes. They are needed by *CII Petitioners* to fulfill federal mandates for use in emergencies and other situations involving the protection of life and property. No undue benefit will be conferred upon Maritime by granting the proposed assignments, as proposed in the Petition, since any money due to Maritime would be placed in escrow. Additionally, there are multiple licenses involved. The total amount of spectrum at issue is but a small fraction of Maritime's larger spectrum holdings,[20] so the Commission will retain ample enforcement leverage over Maritime post assignment.

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for Hearing, 1985 FCC LEXIS 2389, at ¶13 ("Mobilfone") *citing Haney v. Chaney*, 470 US 821, 831 (1985). In Mobilfone, when applying Supreme Court precedent, the Commission upheld the Common Carrier Bureau's initial decision not to initiate enforcement action against certain licenses of Mobilfone, even as other licenses were being designated for hearing.

[19] *Cellular System One of Tulsa*, at ¶8. When applying this balancing test in allowing the transfer of a cellular license interest, the Commission concluded, "we find that the interest in deterrence is outweighed by the more immediate and substantial public interest in the development of efficient and competitive cellular systems." *Id.*, at ¶10

[20] According to the FCC's database, Maritime currently holds 71 active FCC licenses under its FCC Registration Number 0013587779. Four of these licenses (WQGF315, WQGF316, WQGF317 and WQGF318) are area-wide licenses Maritime acquired at auction. These AMTS licenses cover the Mid-Atlantic, Mississippi River, Great Lakes and Southern Pacific Regions. In addition to these licenses, Maritime holds dozens of site-based licenses.

Despite the Bureau's claims, the *CII Petitioners* do not seek to "gut" the Commission's *Jefferson Radio* policy. To the contrary, as discussed below, the *CII Petitioners* request only that the Commission apply *Jefferson Radio* and applicable precedent and treat similarly-situated applicants similarly, as required by law.[21]

IV. THE COMMISSION MUST TREAT SIMILARLY SITUATED APPLICANTS SIMILARLY

Having allowed Metrolink the opportunity to remove itself from the hearing, the Commission must accord the *CII Petitioners*, as similarly situated critical infrastructure applicants, the same treatment.

The Bureau contends that by allowing only Metrolink to show why it should be removed from the hearing, and not the *CII Petitioners*, the Commission created a narrow exception to *Jefferson Radio* based on safety of life considerations reflected in federal mandates. As fellow CII applicants, however, the *CII Petitioners* also seek to use this spectrum to comply with federal mandates aimed at addressing safety of life considerations.[22]

While the Bureau cites a "body count" to support its position that PTC is critically important,[23] a conclusion to which the *CII Petitioners* do not disagree, there can be no real

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[21] *Melody Music, Inc. v. FCC, 120 U.S. App. D.C. 241, 345 F.2d 730 (D.C.Cir. 1965)*; *Garrett v. FCC*, 513 F.2d 1056 (D.C. Cir. 1975). Any basis for disparate treatment must be real and meaningful, not trumped-up after the fact.

[22] *See, e.g.*, 49 C.F.R. § 193.2519 (2010) (the PHMSA's rules require companies operating LNG facilities to have two reliable forms of communications that are not dependent upon each other at its facilities); 49 C.F.R. § 195.408(a) (2010) (requiring each operator of a pipeline facility to have a communication system that provides for the transmission of information needed for the safe operation of its pipeline system). *See also Comment Sought on the Implementation of Smart Grid Technology*, Public Notice, DA 09-2017 (rel. Sept. 4, 2009) (discussing implementation of smart grid and other communications systems pursuant to federal government directive); Critical Infrastructures Protection Act of 2001, PL 107-56, October 26, 2001, 115 Stat 272 (discussing the national security concerns of utilities, oil and gas companies and other critical infrastructure which may be affected by terrorist attacks and concerns that communications systems remain reliable and secure during emergency situations).

[23] Bureau Opposition at 4.

debate regarding the comparable importance of spectrum to electric utilities and oil and gas companies.[24] The safe and reliable distribution of electric service and transportation of natural gas entails at least comparable levels of risk and is entitled to the same support from the Commission as PTC.

From the standpoint of spectrum requirements and compliance with federal mandates, the needs of all critical infrastructure entities (electric utilities, oil and gas companies and railroads alike) are virtually indistinguishable. No significant distinctions have been articulated in the Commission's rules or previous decisions regarding the relative merits of varying CII applicants, and the Commission provides none in the HDO.

As recognized by the Courts, "agency action cannot stand when it is so inconsistent with its precedent as to constitute arbitrary treatment amounting to an abuse of discretion."[25] It is patently unfair and discriminatory for the Commission to allow a railroad to extract itself from this proceeding while not affording the same opportunity to the *CII Petitioners*.

There is no legitimate basis for treating Metrolink differently than *CII Petitioners* in this proceeding. The Commission should reconsider its HDO and expand Footnote 7 to afford *CII Petitioners* the same opportunity as Metrolink to demonstrate why their applications also should be removed from the hearing.

V. THE PETITION FOR RECONSIDERATION IS APPROPRIATE SINCE THE HDO IS AN ADVERSE RULING UNDER THE COMMISSION'S RULES

Under the Commission's rules, a petition for reconsideration of an order designating a case for hearing will be entertained insofar as it relates to an "adverse ruling with respect to

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[24] The tragedies of September 11th and Hurricane Katrina are only two examples of the need for access to reliable, secure communications by all CII companies during times of emergencies.

[25] *See Garrett v. FCC, at 1060 (quoting cases, internal quotes omitted).*

petitioner's participation in the proceeding."[26] In its Opposition, SkyTel claims the mandatory inclusion of the *CII Petitioners*' applications in the HDO, under threat of dismissal with prejudice, is somehow not "adverse" to the *CII Petitioners*. Not surprisingly, the Bureau never even raised the issue in its Opposition.

SkyTel is wrong. The HDO is an adverse ruling against the *CII Petitioners*, since they were required to participate in the hearing under threat of dismissal of their applications.[27] As if there were any doubt, the Commission itself has made clear that it will entertain petitions for reconsideration by parties challenging their inclusion in a hearing proceeding.[28] The *CII Petitioners* are entitled to the same consideration.

* * *

WHEREFORE, THE PREMISES CONSIDERED, the *CII Petitioners* urge the Commission to grant their Petition for Reconsideration.

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[26] 47 C.F.R. § 1.106(a)(1) (2010).

[27] The HDO required *CII Petitioners* to file a notice of appearance to participate in the proceeding or have their pending assignment application(s) "dismissed with prejudice for failure to prosecute." HDO at ¶68

[28] *See, e.g. Western States Telephone Company v. AT&T,* Memorandum Opinion and Order, FCC 77-656 (rel. Sept. 27, 1977). Even if the rule were interpreted as SkyTel suggests, the Commission may waive the restriction as requested by *CII Petitioners* as an alternative basis for relief.

Respectfully submitted,

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June 10, 2011
Attachments: Certificate of Service

CERTIFICATE OF SERVICE

I, Wesley K. Wright, hereby certify that on this 19th day of May, 2011, a copy of the foregoing Motion to Hold Hearing in Abeyance as to *CII Petitioners* was filed with the Commission, transmitted to the Office of Administrative Law Judges via fax number (202) 418-0195 pursuant to the Order (FCC 11M-11) and served on the parties listed below via First Class U.S. Mail.

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